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71-1555

Supreme Court, U. S.
FILED
MAY 24 1972
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1972

No. _____

J. B. JOHNSTON AND VESTA G. JOHNSTON, Petitioners

v.

CALVIN S. BYRD, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

J. B. JOHNSTON and VESTA G. JOHNSTON
AS ATTORNEYS FOR THEMSELVES

CITRONELLE, ALABAMA

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CITATIONS

Statutes:

Title 7 Equity Rules 4 and 5 of the 1958 Recompiled Code of Alabama. . . . . .

EQUITY RULE 4

Upon the filing of the bill of complaint summons shall forthwith issue against the defendant or defendants upon whom personal service is to be made.

EQUITY RULE 5

The summons must be served by the sheriff of the county in which the bill of complaint is filed upon each defendant personally, if such defendant is over 21 years old, has not been adjudged insane by a court of competent jurisdiction in Alabama, and is to be found in his county; and if a defendant resides or is known to be in any other county in this state than that in which the complaint is filed, the sheriff shall send the summons for that defendant to the sheriff of the county in which that defendant resides or is known to be, and that sheriff shall serve it upon the defendant personally.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

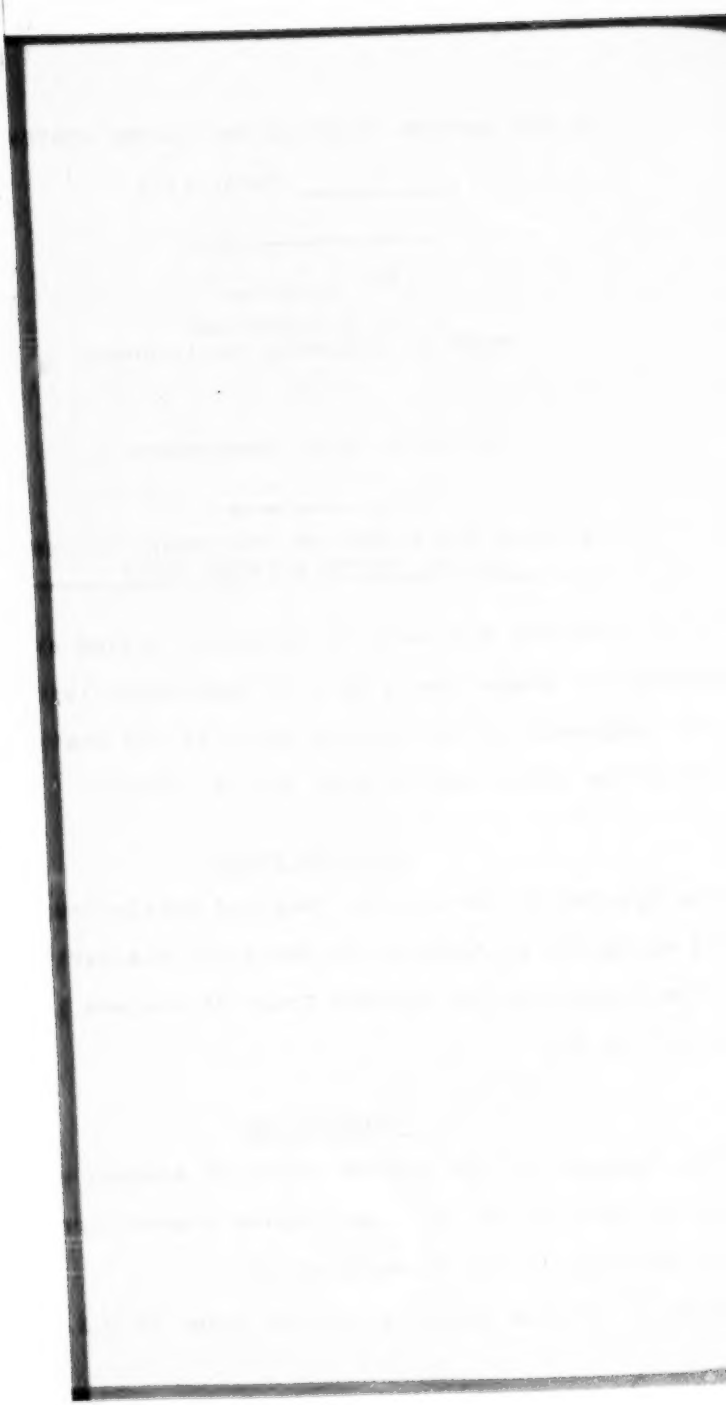
J. B. Johnston and Vesta G. Johnston, acting as Attorneys for themselves, prays that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Alabama entered in the above case on February 24, 1972.

OPINIONS BELOW

The opinion of the Circuit Court of Mobile County Alabama sitting at Equity is reported in the court transcript at page 140. The opinion of the Supreme Court of Alabama is reported at 258 So. 2d 366.

JURISDICTION

The judgment of the Supreme Court of Alabama was made and entered on February 24, 1972 and copies thereof are appended to this petition in the appendix at pp. . The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).



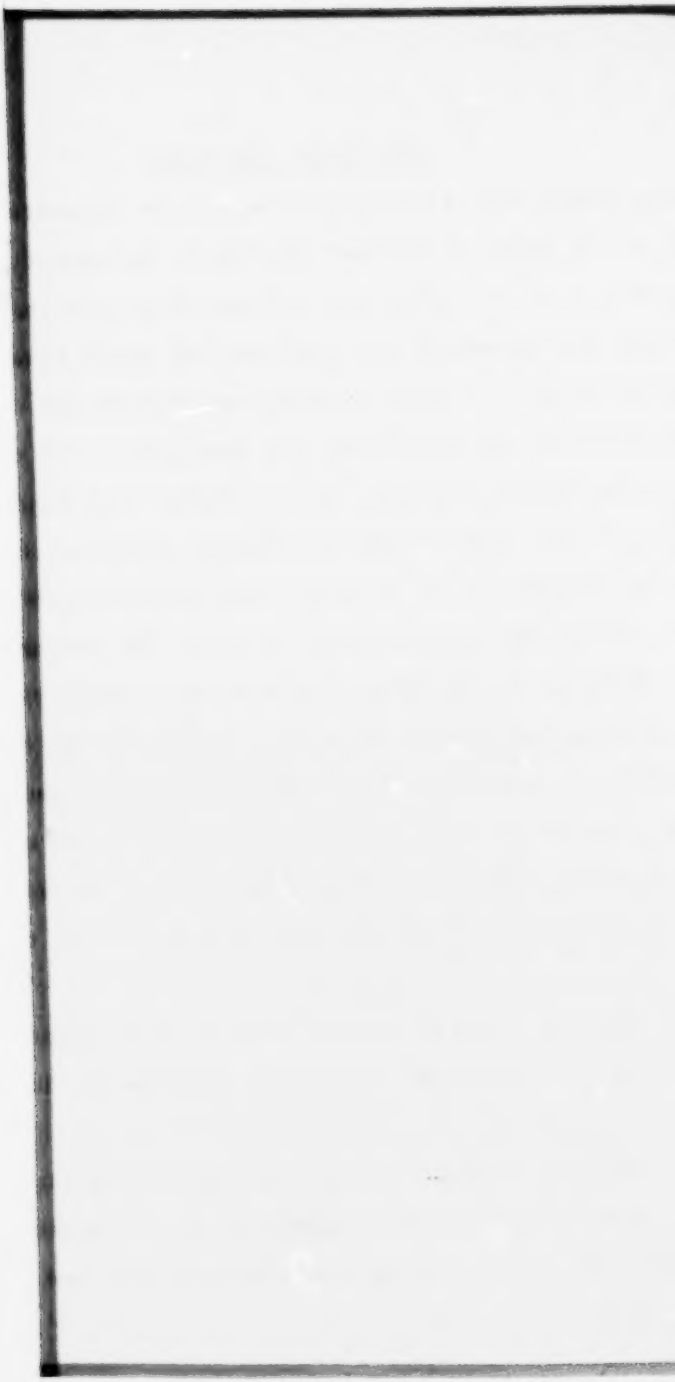
QUESTIONS PRESENTED

Respondent sued at equity to enjoin Petitioners from prosecution suits based on alleged settlement agreement. (R 3). Petitioner, J. B. Johnston was criminally prosecuted by Respondent after the agreement was executed and spent time under imprisonment (R 125). Vesta G. Johnston, Petitioner did not receive service of the complaint, nor was present at the time of the trial to defend herself. Also property and money of a sum in excess of the judgment and settlement agreement obtained against Petitioner, J. B. Johnston has been retained by Calvin S. Byrd, one of the Respondents. (R 111) The Supreme Court of Alabama affirmed the holding of the Circuit Court of Mobile County holding that Petitioners were to be held to the settlement agreement. (Appendix) The questions presented are:

(1) Whether a settlement agreement can be so enforced as to deny a person the right to recover damages for subsequent malicious prosecution that amounted to a breach of the agreement?

(2) Whether a party can be bound by a decision of a court where she had no notice or service as required by due process of law?

(3) Whether a party can be deprived of the right to recover property taken in excess of judgment by an injunction in equity which drops all suits pending and prohibits any new suits against certain parties?



STATEMENT

This suit arises out of a series of suits based upon a prosecution for a worthless check. The basic facts which are not in dispute, are as follows: On August 22, 1961, J. B. Johnston, Petitioner, executed a complaint against Calvin S. Byrd, Respondent for issuing a worthless check. (R 4) Respondent plead guilty in the Court of General Sessions of Mobile County, Alabama, but obtained a verdict of not guilty on appeal to the Circuit Court of Mobile County, Alabama. (R 6) Respondent then sued and obtained a judgment for malicious prosecution in the amount of $31,630.00. (R 10) On appeal to the Supreme Court of Alabama, this amount was reduced to $15,000.00. (R 12) On May 5, 1964, Respondent instigated a criminal prosecution against Mr. Johnston for "Selling, Removing or Disposing of Property Subject to Execution". (R 125) After considerable litigation a settlement agreement was executed on June 28, 1966 between Petitioners and Respondent. (R 20) This settlement provided that all litigations between Petitioners and Respondent was to be ended as to suits against each other arising out of this transaction, both those now pending and those in the future. The Petitioners were also to pay $10,000.00 to the Respondent.

The Respondent has collected at this time $10,000.00 as stated in the settlement agreement, (R 110) $5,245.00 in oil royalties of Petitioner, Vesta G. Johnston, (R 111) $22,687.04 worth of property levied on by the sheriff (R 42) and $299.00

for later oil royalties belonging to Vesta G. Johnston. (R 111) The $299.00 figure was received by Respondent subsequent to the execution of the settlement agreement. All of this money and property which was collected by Respondent was in satisfaction of the $15,000.00 judgment obtained by them against Petitioner, J. B. Johnston and none of the excess has been returned to the Petitioners.

On February 27, 1969 the prosecution of Mr. Johnston for withholding property was dismissed on the motion of the Respondent. (R 125) Thereupon the case that is now before the court was filed in the Circuit Court of Mobile County, Alabama sitting in Equity with the results that there was a finding for the Respondent and Petitioners were enjoined from continuing or filing any suits against Respondent concerning this subject matter. (R 140) At the time of this case Vesta G. Johnston was not present at the trial of the case and had not been served with process.

On appeal to the Supreme Court of Alabama the judgment for Respondent was affirmed (Appendix) and a motion for rehearing was denied. In affirming the judgment of the lower court, the Supreme Court of Alabama relied on the findings of fact by the trial court and refused to look into the facts of the case. It also made no effort to address itself to the assertion by the Petitioner, Vesta G. Johnston that she had no service of process in this case nor was present at

the trial of the case.

REASONS FOR GRANTING THE WRIT

The decisions below should be reviewed because they do not adequately protect certain of the Petitioners constitutional rights which have been violated. The courts have in effect enabled the Respondent to escape any prior or subsequent remedy that the Petitioners may have against them while relying on a so called settlement agreement and a injunction by the courts. The following are the reasons that these rulings should be reviewed.

(1) To deny the Petitioner, J. B. Johnston recovery for malicious prosecution that occurred subsequent to the settlement agreement, would be to deny him the right to trial by jury as contained in the 7th Amendment and the right to due process by law as contained in the 5th Amendment, all of which is embodied into the 14th Amendment of the U. S. Constitution. To uphold the settlement agreement which was breached by the further prosecution of Mr. Johnston subsequent to his execution, would enable the Respondent under the prior rulings to exact wrongs from Mr. Johnston on which he would not be able to seek redress.

(2) To allow Mrs. Vesta G. Johnston to be held to the judgment below when she was neither served with process as required by Title 7 Equity Rules 4 and 5 of the 1958 Recompiled Code of Alabama, nor present at the time of the trial, would amount to a

denial of due process under the 5th Amendment as incorporated in the 14th Amendment of the U. S. Constitution. Certain property of Mrs. Johnston has been levied upon and unless she is allowed to come into court and recover this property, this would amount to a taking of property under the 5th Amendment and a denial of a jury trial under the 7th Amendment, all incorporated within the 14th Amendment.

(3) To allow the Respondent to retain property in excess of the amount of the judgment that they have over Mr. Johnston, without him being able to proceed with a suit to recover such excess property would amount to a deprivation of property without due process of law under the 5th Amendment and a right to trial by jury under the 7th Amendment, all of which is incorporated in the 14th Amendment of the U. S. Constitution.

CONCLUSION

For the reasons set forth above; it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. B. Johnston & Vesta G. Johnston

J. B. JOHNSTON & VESTA G. JOHNSTON
AS ATTORNEYS FOR THEMSELVES

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We hereby certify that a true and correct copy of this
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J. B. Johnston + Vesta G. Johnston

J. B. JOHNSTON AND VESTA G. JOHNSTON
PETITIONERS AND ATTORNEYS FOR THEMSELVES

ed this 5 day of May, 1972.